(3)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR,MP.

Criminal Appeal No. 574 /97.

APPELLANT. (IN JAIL). : Kochai @ Bhairi, S/o. Baiga Gond, age 55 years, R/o. Vill- Dandgaon, PS- Lakhanpur Distt- Sarguja, MP.

-Versus-

RESPONDENT. : The State of M.P. through PS- Lakhanpur District- Sarguja, MP.

10493

Filed on 4.8.97

by Shri S Beniwal Advocate

4/8/97

Rlw. A. R.

CRIMINAL APPEAL U/S. 374(2) OF THE CODE OF CRIMINAL PROCEDURE-1973.

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO.1574/97

Kochai alias Bhairi

vs.

State of M.P.(C.G.)

ORAL JUDGMENT

Per Hon.R.S. Garg, J :

Being aggrieved by the judgment dated 18-6-1997 passed in Sessions Trial No.439/96 by the learned Sessions Judge, Sarguja (Ambikapur) convicting the appellant under Section 376(2)(f) I.P.C. and sentencing him to undergo R.I. for ten years, the appellant has filed this appeal.

2. The prosecution case in brief was that the prosecutrix Rambai was fell on the ground by the accused and he committed rape upon her. The first information report was lodged by the prosecutrix on 16-11-1996, she was sent for her medical report. Memorandums were prepared and the statements of the witnesses were recorded. On completion of the investigation, the accused was tried and convicted and sentenced as referred to above.

3. Learned counsel for the appellant has not challenged the finding relating to sexual assault upon the prosecutrix but has made one single submission that as the prosecution failed in proving the age of the prosecutrix and further that she was below 12 years of age, the accused could not be convicted under Section 376(2)(f) of I.P.C..

4. On the other hand, learned counsel for the State submits that from the medical report, the statements of the prosecutrix and the statements of the doctor, it

would clearly appear that the girl was below 12 years of age, therefore, the court below was justified in convicting the appellant.

5. To prove the age of the girl, theprosecution has relied upon a certificate issued by the Head Master of the school. The said document is available on the record as Ex.P/10. It is to be noted that the said document has been produced in the statements of P.W.4 Ramcharan. The prosecution agency in its wisdom did not examine the Head Master, who had issued the certificate nor it produced the original register, on basis of which this certificate was issued. The prosecution agency did not examine anybody to prove that he had made the entries in the original register. Nobody says that the entries were made in the regular course of business and the certificate, Ex.P/10, was true reproduction of the entry as maintained in the register. It is trite law that production of a document is not the proof of the same. In the present case, barring production of the document, the prosecution agency did not care to prove the contents of the documents.

6. P.W.1 Ku.Ram Bai was estimated to be about 11 years of age. She nowhere said that she was 11 years or less than 12 years. P.W.2 Duhni Bai, the mother of the prosecutrix, did not speak even a single word in relation to the age of the prosecutrix. P.W.6 Dr.Smt. Shipra Shrivastava had stated that she had examined a young girl of ten years and had found certain injuries in her private parts. Learned counsel for the State submits that this statement of Dr.Smt.Shrivastava must be finally accepted to hold that the prosecutrix was about ten years of age.

7. Opposing the submission, learned counsel for the accused submits that the estimation made by Dr.Smt. Shrivastava would not take the place of positive evidence. He submits that the age of the girl could be proved either on the basis of the birth certificate, an entry from the birth register, a properly proved entry of the school register or on the basis of the statements of the parents or an estimated age can be brought on record on the basis of the ossification report.

8. In the opinion of this Court, the statement made by the learned counsel for the appellant has force. If a doctor simply makes an estimation in relation to the age of somebody, then that remains an estimation which may or may not be correct. In the present case, the Court estimated the age of the girl to be 11 years. Nobody said that the girl was below 12 years. Dr.Smt.Shrivastava did not examine the girl to estimate her age, in fact she had examined the person of the prosecutrix and was to give report about the physical condition of the prosecutrix and the sexual assault made on her.

9. Section 376(2)(f) I.P.C. says that whoever commits rape on a woman when she is under 12 years of age shall be punished with R.I. for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. To secure a conviction under Section 376(2)(f), the prosecution has to prove beyond shadow of doubt or atleast to a reasonable certainty that the girl on the date of incident was below 12 years of age.

10. In the present case, as the age certificate, Ex.P/10, has not been proved and there is no other legal evidence to hold that the girl was below 12 years of age on the date of the incident, it is not possible to hold that the accused can be convicted under Section 376(2)(f) of IPC. His conviction and sentences for offence punishable under Section 376(2)(f) are set-aside. Instead, he is convicted under Section 376(1) of I.P.C. and is awarded seven years R.I..

11. Section 376 IPC provides that while convicting a person and awarding the sentence the Court shall impose fine. The appellant shall pay fine of Rs.5000/-, in default of payment of fine, he shall undergo R.I. for one year. If the fine amount is recovered, the same be paid to the prosecutrix after due verification.

12. The appeal is allowed to the extent indicated above.

Sd/-
R.S. Garg
Judge

26-9-2001.

H/-
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